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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 12.

Consolidated With Nos. 27 and 28.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEES, STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEES, STATE OF ILLINOIS AND ILLINOIS COMMERCE COMMISSION.

This appeal involves a Section 13(4) order of the Interstate Commerce Commission (297 I. C. C. 353, R. 28-41, 75-77) which was set aside and enjoined by a three-judge statutory court (146 Fed. Supp. 195, R. 460-471).

INITIAL STATEMENT.

This is *not* a persons or localities preference or prejudice matter and it is *not* a situation where the intrastate rates are raised to the level of previously fixed interstate rates.

This is a case where the Interstate Commerce Commission has raised *one set* of intrastate rates (suburban fares) upon the basis of an alleged revenue discrimination against interstate commerce.

QUESTIONS PRESENTED.

While this appeal concerns the decision of the District Court, it is actually the order of the Interstate Commerce Commission which is under attack.[1]

The basic issues on this appeal are:

(1) Does the order of the Interstate Commission contain sufficient findings of fact to justify the imposition or exercise of jurisdiction to increase intrastate rates?

(2) Are the findings of the Interstate Commission supported by substantial evidence?

Since the determination of the first question depends on mixed questions of law and fact, the issue may be more succinctly stated:

(a) Does the mere finding that the suburban passenger service is operating at a loss (while at the same time the interstate passenger operation sustains a sub-

1. The Appellants have attacked certain language of the opinion of the court and based their appeal thereon. For instance, the Solicitor General's appeal concerns only two questions which do not affect the basic judgment of the lower court, but do concern certain statements made in the court's opinion. See memorandum filed for the United States in No. 27. However, it is the lower court's *judgment* and not the particular statements made in the opinion, that this Court reviews. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297. The lower court's judgment is simply that the "justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us." (R. 470.)

stantial deficit) justify the exercise of Interstate Commerce Commission jurisdiction, and

(b) Does a finding that the suburban service has an out-of-pocket deficit of $306,000 while the total passenger deficit (almost entirely interstate) is $22,824,000 justify an alteration of suburban fares by an increase of $383,000 which wipes out the $306,000 loss and contributes $77,000 to the rest of the Railroad's operation?

STATEMENT.

Proceedings Before Illinois Commission.

On July 24, 1952, the Milwaukee Railroad filed with the Illinois Commerce Commission a petition to discontinue all of its off-peak suburban trains and requested an increase in suburban fares on the remaining trains of approximately 33%, or in the alternative, if the discontinuance of trains was denied, that the suburban fares be raised approximately 73%. After extended hearings, the Illinois Commission entered an order on November 10, 1954 in which it denied any fare increase to the Milwaukee Railroad (R. 77-92). The order of the Commission found that the expenses of the Milwaukee Railroad were somewhat overstated and that by converting the suburban operation from steam to diesel locomotives, the Railroad could save approximately $1,000,000 annually which would eliminate any deficit on the suburban service (R. 80-86).[2] In the evidence intro-

2. The Railroad had completely dieselized the suburban service by the end of September, 1954. The report of the Interstate Commission after allowing depreciation and maintenance-of-way expense of over $250,000 determined that the Railroad's out-of-pocket expense was only $306,038. Thus, the Interstate Commission's report of November 21, 1955, confirmed the finding of the Illinois Commission that dieselization would save approximately $1,000,000 annually. Appellant Railroad's statement in its brief that the Illinois Commission overestimated the Railroad's savings by $453,000 a year is done by comparing the estimate to the actual expense based only a four months' period with no showing that the four months used are average months and also, on the basis of using 2,000 H. P. diesels which had been retired from

duced before the Illinois Commission, no claim was made for any depreciation or maintenance-of-way expense as constituting a part of the out-of-pocket expense (R. 398). While the Illinois Commission rejected approximately $290,000 of claimed union station expense (R. 83-85), the Interstate Commission also rejected $240,000 (R. 33-34). The rates thus left in effect by the order of the Illinois Commission were as high or higher than the rates for diesel operated service on the Burlington and Rock Island railroads (R. 420), but were somewhat lower than those on the electrified service of the Illinois Central and South Shore and the steam locomotive service of the North Western.

Proceedings Before Interstate Commission.

After the order of the Illinois Commission the Milwaukee Road filed a petition requesting the Interstate Commission to institute an investigation under Sections 13(3) and (4) of the Interstate Commerce Act (R. 24-27). The Railroad introduced evidence concerning its expenses allocated to the suburban service which tended to show a deficit of $724,511, while evidence introduced on behalf of the protestant Commuters' Association indicated an income of $9,701 (R. 40). In the proceedings before the Interstate Commission, the Railroad claimed depreciation and maintenance-of-way as a part of their out-of-pocket expense which had not been claimed or introduced before the Illinois Commission (R. 202-203).

No revenue figures or operating ratios on either passenger or freight operations were introduced by the Milwaukee Railroad, except the revenue from the suburban passenger operation for the year of 1954 in an amount of $1,796,231

main line service and were approximately 8 years old (R. 167, 379, 385-387). The expense of diesel fuel was based on only a 47 day test period. In our Petition for Reconsideration we requested that the Interstate Commission grant a rehearing so that a full year's operation could be shown (R. 74).

(R. 382), and for the last four months of 1954 in an amount of $607,333 (R. 384). The only evidence offered concerning interstate passenger coach fares showed that the present interstate fares were the same or lower than the present intrastate fares (R. 350).

On November 21, 1955, the Interstate Commission issued its report (297 I. C. C. 353, R. 28-40) prescribing an increase averaging 20% in the intrastate suburban passenger fares, with the minimum at 25 cents per trip. Some of the prescribed fares were even higher than those proposed by the Railroad (R. 38).

The report found that the Railroad had an out-of-pocket deficit of $306,038 on the suburban operation and then prescribed fares which based on the 1954 movement "would result in an increase in revenue of $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to the indirect costs and taxes of approximately $77,000 annually" (R. 34). At the same time the report found that the Milwaukee Railroad earned from its freight operations $37,393,050 (both interstate and intrastate) and suffered a deficit from its passenger operation of $22,824,532 (mostly interstate) (R. 35). *Not one word is found in the report concerning the Railroad's revenues* (other than suburban revenue) *nor any finding or subsidiary statement regarding the contribution that the suburban service should make as its fair proportionate share to the Railroad's income.*

Petitions for reconsideration were filed (R. 45, 68), but were denied by the order of March 2, 1956 and the Railroad authorized to place into effect the increased intrastate suburban fares on April 20, 1956 (R. 76-77).

Order of District Court.

On April 13, 1956, the State of Illinois, Illinois Commerce Commission and the Milwaukee Road Commuters' Associa-

tion filed an action to review the Interstate Commission's report and order (R. 2-92). The Railroad was directed to impound the increase in the fares pending the outcome of the case. After full briefs and the presentation of oral arguments, the statutory three-judge District Court concluded that the order of the Interstate Commission was not supported by the requisite findings required to support its order and that the evidence failed to support the finding that the intrastate fares which were prescribed will be just and reasonable for the future (R. 460-471). Appeal was prayed to this court and the increase in fares continued to be impounded.

SUMMARY OF ARGUMENT.

I.

THE STATED FACTS AND THE FINDINGS MADE IN THE ORDER OF THE INTERSTATE COMMERCE COMMISSION DO NOT JUSTIFY THE EXERCISE OF JURISDICTION TO FIX AND DETERMINE INTRASTATE RATES.

Section 13(4) authorizes the exercise of Interstate Commerce Commission jurisdiction to establish intrastate rates on the basis of a revenue discrimination against interstate commerce, only upon findings, supported by subsidiary factual recitals, that the intrastate rates are not contributing their fair proportionate share of the carrier's revenues and that the increased rates will constitute no more than the intrastate's proportionate share of the income necessary for the maintenance of the carrier's transportation system. The report of the Commission in the instant case contains no such findings. The present report seeks to justify the establishment of intrastate fares on the basis of *revenue deficiency*, rather than *revenue discrimination against interstate commerce*. Section 13(4) cannot be legislated into a Section 15 rate case except by Congress. As the District Court stated, a fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment since the paying of all the costs of suburban operation and also making a contribution to the other costs of the Railroad may well be more than contributing a fair proportion of the Railroad's total income. Not only are the findings insufficient, but the facts disclose no actual revenue discrimination against interstate commerce and no disparity of rates between the intra and inter state fares.

II.

THE REPORTED FACTS AND SUBSIDIARY RECITALS, AS WELL AS THE EVIDENCE, DO NOT SUPPORT THE FINDINGS THAT THE RATES ARE JUST AND REASONABLE.

Intrastate rates established by the Interstate Commerce Commission must be just and reasonable. The evidence in this record does not support such a finding. The reasonableness of rates cannot rest upon a comparison of the rates prescribed for other railroads without a showing of similarity of operating conditions. No showing was made that the operating conditions of the North Western Railroad were similar to the Milwaukee. Similarity of territory is not equivalent to similarity of operating conditions. Neither will cost of service sustain the reasonableness of a Section 13(4) intrastate rate on the basis of a removal of undue discrimination against interstate commerce when the cost of service is that of the intrastate operation and there has been no previously fixed rate for the same interstate operation. Just and reasonable intrastate rates are not established on the basis of ability to pay.

III.

THE DECISION OF THE DISTRICT COURT THAT THE STATE COMMISSION SHOULD BE AFFORDED THE CHANCE TO FIX RATES ON THE SAME BASIS AS THE INTERSTATE COMMISSION IS FULLY JUSTIFIED BY THE FACTUAL SITUATION IN THIS CASE.

The rate increased by the Interstate Commission in this case is primarily intrastate. The question of a deficit arising from intrastate suburban fares and the fares necessary to remove such a deficit should be decided solely by the state commission and not the Interstate Commission. If, however, the Interstate Commission is allowed jurisdiction to fix an intrastate rate merely because it is non-

compensatory, the state commission should be allowed to pass judgment on that noncompensatory feature by examining the same evidence as is offered to the Interstate Commission. Especially is this true when the deficit determined by the Interstate Commission is under a formula which that Commission is presently investigating on the ground that it is doubtful if it gives an accurate picture of the passenger deficit. No hardship results upon the carrier by requiring it to produce the same evidence and present the case upon the same basis to both the state and federal commissions, since Section 13(3) authorizes joint hearings and the usual procedure in suburban fare cases has been to make application before both commissions at the same time and have a joint hearing.

IV.

THE ORDER OF THE COMMISSION CREATES A DISCRIMINATION AGAINST INTRASTATE COMMERCE INSTEAD OF REMOVING A DISCRIMINATION AGAINST INTERSTATE COMMERCE.

In the absence of any revenue figures other than suburban revenues, the only comparisons from the evidence submitted disclose that the suburban fares are contributing more than their proportionate share to the total operations of the railroad. Also the evidence shows that the intrastate fares are higher than the interstate fares. Such disparity compels the suburban passenger fares to contribute to costs of the railroad in a greater proportion than the interstate passenger fares and creates an actual discrimination against intrastate commerce.

V.

THERE IS NO INDEPENDENT BASIS FOR ESTABLISHING THE TWO INTERSTATE FARES AND THE DISTRICT COURT ACTED PROPERLY IN SETTING THEM ASIDE.

The only basis for prescribing the interstate fares for Zenda and Walworth were on "the same bases prescribed for intrastate application." When the basis for the establishment of the intrastate rate fell, the basis for the two incidental interstate fares likewise fell.

ARGUMENT.

I.

THE STATED FACTS AND THE FINDINGS MADE IN THE ORDER OF THE INTERSTATE COMMERCE COMMISSION DO NOT JUSTIFY THE EXERCISE OF JURISDICTION TO FIX AND DETERMINE INTRASTATE RATES.

The authority conferred by Section 13(4) upon the Interstate Commerce Commission did not deprive the states of their primary right to regulate intrastate rates, and the Interstate Commission's power is dominant *only* insofar as necessary to remove (1) an undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or (2) undue, unreasonable or unjust discrimination against interstate or foreign commerce caused by existing intrastate rates.

As previously stated, this is not a persons or localities preference, but the order must stand or fall on the basis of *undue, unreasonable* or *unjust* discrimination against interstate commerce. Do the facts and findings in the order show, *first*, a revenue discrimination, and *second*, an undue or unreasonable discrimination?

While the order concludes with the necessary ultimate findings that the intrastate suburban fares imposed by the authority of the State of Illinois cause undue, unreasonable and unjust discrimination against interstate commerce and that the prescribed increased fares will remove that discrimination, the only subsidiary finding to justify that conclusion is the one statement that the suburban service is operating at a loss.

Not one word is found in the report and consequently no finding is made as to the revenues of the Milwaukee either with respect to total passenger service or total freight. The report does find that the revenue from the suburban service is $1,799,140 (R. 34), but fails to indicate anywhere the revenue from the other operations either on an intrastate or interstate basis or on a total basis. The report contents itself with the fact that the total passenger service has a $22,800,000 deficit and the freight service (both interstate and intrastate) results in a $37,400,000 net income (R. 35). So far as the report shows, the interstate passengers could have been transported for nothing, while the intrastate suburban passengers contributed $1,800,000 to the Milwaukee's revenues.

This Court has specifically held that a mere finding that a rate is non-compensatory is not sufficient to sustain the extraordinary imposition of Interstate Commerce Commission jurisdiction over intrastate rates. In *Florida* v. *United States*, 282 U. S. 194, the court speaking through Chief Justice Hughes analyzes the exercise of jurisdiction under Section 13(4) by stating at page 211:

> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that *intrastate traffic should pay 'a fair proportionate share'* of the cost of maintenance." (Emphasis added.)

and at page 214:

> "But to justify the Commission in the alteration of intrastate rates, it was not enough *for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory.* The authority to determine the reasonableness *per se* of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission. In considering the authority of

the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, *the question is that of the relation of rates to income.*" (Emphasis added.)

The requirement that the intrastate rates "should pay a fair proportionate share of the cost of maintaining an adequate railway system", *Wisconsin* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 586, is one of substance and not mere form. As the court so aptly stated in the *Florida* case (*supra*) "the question is that of the relation of rates to income." Being a matter of real substance, a finding as to the "fair proportionate contribution" to the carrier's revenues by the intrastate rates must be made.

The Appellant Railroad would lead one to believe that such a finding is not necessary,[3] while the Appellant Interstate Commerce Commission contends that the equivalent of such a finding has been made[4]. However, the Solicitor General has conceded both—that such a finding is required and that such a finding has not been made.[5]

The many decisions of this Court in which it has been specifically[6] stated that the order of the Interstate Commission either lacked or contained the finding that the intrastate rates were "not contributing their fair share" to the revenues required to maintain an adequate transportation system[6] should be the answer to the contention

3. Milwaukee's brief in No. 12, page 19.

4. Interstate Commerce Commission's brief in No. 28, page 24.

5. Solicitor General's memorandum filed in No. 27 in which his appeal is limited to only two questions, neither of which pertain to the adequacy of the findings. See also his Jurisdictional Statement in No. 502, October Term, 1956.

6. *Florida* v. *United States*, 282 U. S. 194, 214, 215; *North Carolina* v. *United States*, 325 U. S. 507, 516; *King* v. *United States*, 344 U. S. 254, 270, 275. In the latter case this court in distinguishing the *North Carolina* case said:

"The finding which was *primarily needed*, and *was there found lacking*, was one that the intrastate service at 1.65 cents per

of the Railroad. Not only has this Court consistently looked for such a finding but such a required finding logically follows when the issue is a revenue discrimination. Mere disparity of rates between intrastate and interstate does not constitute revenue discrimination.[7] Consequently, how else can the relationship of intrastate rates to income show a revenue discrimination except by findings which show what the income of the carrier is and the fair proportionate share that the intrastate rates should bear to the total revenue of the carrier. These findings can be in the recitals of the order as statements of fact and need not be in the "formal or ultimate findings." However, the report and order of the Commission must show facts which disclose a reasonable basis that the intrastate rates are not contributing their "fair proportionate share" to the total revenues required for maintaining the railroad system. Certainly, some significance must be given to the words "fair" and "proportionate." This Court would not continually use a meaningless phrase that had no factual importance.

In the case at bar, there is no finding nor is there any factual recitation of the amount which the intrastate suburban fare should contribute in order to meet its "fair proportionate share" of the revenue necessary for maintaining the Milwaukee's transportation service. In fact, as before stated, there is no finding or factual recitation as to the Milwaukee's total revenues upon which to form a basis for a determination that the $1,800,000 of suburban revenue fails to constitute its fair proportion of the Railroad's revenue. On an operating ratio basis, the suburban

mile *did not contribute its fair share* * * *." (Emphasis added.)

Cases upholding Interstate Commission orders where the Commission found a persons or localities discrimination are not in point.

7. *North Carolina v. United States*, 325 U. S. 507, 516; *King v. United States*, 344 U. S. 254, 270.

service operates at 114.8%. However, there is no finding and no evidence as to the general passenger operating ratio of the Milwaukee.[8] If we use any district or regional operating ratio or the national average we find that the suburban service is maintaining its end better than the rest of the passenger service.

In answer to the Interstate Commission's "equivalent theory" we think a study of the findings approved in *King v. United States*, 344 U. S. 254, 268, which were:

> (a) that "transportation conditions incident to the intrastate transportation of freight in Florida are not more favorable" but are "less favorable" than interstate freight;
>
> (b) that the "present interstate freight rates" within Florida "are just and reasonable;"
>
> (c) that the "Florida intrastate rates, * * * *are abnormally low and are not contributing their fair share to the revenues required*" to render an efficient service;
>
> (d) that the establishment of "intrastate rates and charges increased sufficiently to equal the level herein approved will substantially increase respondent's revenues therefrom, and *will constitute not more* than a fair proportion of respondent's total income;"

and which were supported by a lengthy report consisting of a factual analysis and history of the Florida intrastate rates (see 278 I. C. C. 41 to 72),[9] are wholly different and

8. The operating ratios of Class I railroads for passenger service are:

Year	All District	Eastern District	Pocahontas region	Southern region	Western District
1954	138.16	121.18	167.22	139.68	157.60
1955	137.60	122.84	165.26	137.39	154.84

Source: Sixty-Ninth Annual Report on Transport Statistics in the United States (ICC) Table 99, page 61.

See: *King v. United States*, 344 U. S. 254, 262, where the court referred to the operating ratios for the passenger service.

9. The Commission there states: "Our power to require an increase in intrastate rates depends upon whether intrastate traffic

can not even be considered similar, let alone "equivalent", to the findings and report in the case at bar. Here the report merely recites as subsidiary facts that:

> (a) the total revenues from the suburban service were $1,799,140 while the expenses were $2,269,404 and credit for non-revenue passengers of $164,226 results in an out-of-pocket deficit of $306,038.
>
> (b) if the fares were increased 20% with a minimum of 25¢ per trip, the increased revenue based on 1954 movement would be about $383,000 "which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes of approximately $77,000 annually."
>
> (c) In 1954 Respondent earned from its freight operations $37,393,050 and suffered a deficit from its passenger operations of $22,824,532 resulting in a net railway operating income of $14,568,518.

From such recitals the report draws the conclusion:

> "To the extent that this suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, State and interstate." (297 I. C. C. at page 359, R. 35-36.)

The report then makes the formal findings that the present intrastate suburban fares cause an undue, unreasonable

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is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are not seeking an increase in the intrastate revenue sufficient to give them a fair return on the value of their property devoted to freight service but merely to secure a contribution to maintenance and operating costs, including taxes, *more nearly proportionate to the contribution thereto made prior to the increase* in Ex Parte No. 162 and Ex Parte No. 166. *We may properly use such prior contribution as a valid criterion of fairness*, in the light of which the Florida intrastate rates and charges in 1947 and 1948 afforded a disproportionately small share of the revenue required to meet the costs of the service in Florida." (278 ICC at 67.) Here the Commission was raising intrastate rates to the level of previously fixed interstate rates; and still the requirement of fair proportionate contribution was necessary.

and unjust discrimination; that such discrimination should be removed by establishing the fares prescribed which fares "will be just and reasonable for the future" and are necessary "so that the travel thereunder may make a fair contribution to the respondent's indirect cost and return on investment". Not only is there no comparison between the detail and factual study made by the Commission in 278 I. C. C. 41 with the report of the Commission in this case but there is a distinct difference between the ultimate findings themselves. As the lower court so aptly stated (146 F. Supp. 195) at page 199 (R. 465):

> "A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment. Paying all of the costs of suburban service and, in addition, making a contribution to the other costs of the railroad, may well be more than contributing a fair proportion of Milwaukee Road's total income. Nor is it sufficient that the interstate commission found that, to the extent that the suburban service 'fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs', it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand."

Both appellants, The Milwaukee Railroad and the Interstate Commerce Commission would have this court construe Section 13(4) to mean *revenue deficiency*, rather than *revenue discrimination against interstate commerce*. Their entire approach is on the basis, as is the Commission's report itself, that these intrastate suburban rates should be fixed and determined as if it were a general Section 15(1) matter. The tendency of the Commission has been more and more to legislate Section 13(4) down to a Section 15(1) proceeding. They now seek to have this Court sanction such legislative usurpation. If Section 13(4) is to be

reduced to an ordinary revenue deficiency determination, Congress should do so and not the Interstate Commerce Commission.

We respectfully submit that the ultimate issue before this Court is simply this: *Will the passenger revenue deficit support the exercise of Interstate Commerce Commission jurisdiction to increase an intrastate rate which the Commission determines can be increased without any appreciable loss of traffic?* Regardless of refined legalistic pronouncements, that is the fundamental basis of the instant Interstate Commission's report. It is frank enough to admit it by bluntly stating:

> "* * * the fact that respondent cannot make a profit or at least so far has been unable to make a profit on its other passenger-train service is no reason for depriving it of an opportunity to make a profit on its suburban operations if it can be done at lawful fares." (297 I. C. C. at 359, R. 36.)

The mere addition at the end of the statement "if it can be done at lawful fares" adds nothing, especially when the so-called "lawful fares" are arrived at without comparing the contributions made by intra and inter state traffic to determine if there is any actual discrimination, let alone any "undue discrimination." "Lawful fares" in the absence of "unjust discrimination against interstate commerce" are those prescribed by the State. The District Court refered to this disregard of fundamentals by saying:

> "The limitless requirements implicit in the practice just cited from the report are reminiscent of public fund raising campaigns which used as their slogan 'Give till it hurts'." (146 F. Supp. at page 200, R. 467.)

The only evidence in this record concerning the comparison of fares is the schedule showing that the present intrastate rates range from 4.84 to 2.53¢ per mile while the

interstate fares are from 2.53 to 2.30¢ per mile (R. 350), and the report itself states that "Respondent's present interstate and intrastate coach fares, * * * between points in this area are made 2.5 cents per mile, minimum 15¢." (297 I. C. C. at 354, R. 29).

Not only do we submit that there has been no actual showing of any *discrimination* against interstate commerce, but the report clearly fails to show "*an undue, unreasonable and unjust discrimination.*" On the basis of the facts stated in the report, the $306,000 suburban service deficit amounts to but 1.3% of the passenger deficit of $22,800,000 and amounts to less than a 1% drag on the $37,000,000 net earnings from the freight operations. Does such *de minimis* revenue deficiency even if considered to be discriminatory against interstate commerce amount to an *undue and unreasonable* discrimination? We submit that it is high time the brakes were again applied to the loose reports and inadequate findings of the Interstate Commission.[10] The mere statement that there is undue, unreasonable and unjust discrimination against interstate commerce without reciting facts to support such conclusion should be condemned.[11] The District Court has expressed its censor in holding that "justification for the exercise of federal power to nullify state rights does not clearly appear from the record before us."

The state commissions are fully aware of the need for an efficient, strong and adequate national transportation

10. "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, * * *." *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 590.

11. This court in *North Carolina* v. *United States*, 325 U. S. 507, at 512 cautioned the Commission that Congress intended some meaning and weight to be given the words "unjust discrimination" and that the court would not condone an over-simplified form of proof.

system. However, we also believe that the mass transportation which is involved in these suburban fare cases is equally important to the national interest. The problems of traffic congestion and the large loss of life in traffic accidents require, in the public need, the promotion and continuance of adequate mass transportation commuter service at reasonable rates. Exacting some subsidy from the freight service to support mass commuter transportation service is as justifiable as requiring the freight service to support interstate passenger service.[12] Just and reasonable rates depend upon the value of the service as well as upon the cost of service,[13] and in the determination of local mass transportation commuter fares, the state commissions are in a much better position to make that determination than the Interstate Commission.

The action of the Interstate Commission in fixing and establishing the intrastate suburban fares for the Milwaukee Railroad, if affirmed by this Court, will remove such fares from the jurisdiction of the Illinois Commission. There is no saving clause in the Commission's report such as was mentioned in the *North Carolina* and *King* cases,[14] and it is questionable if one could be made as this is not a general order raising intrastate fares but a specific order for a particular rate on a specified railroad.

12. See the recent decision of the Commission in "Increased Fares, Official Territory, 1956 decided April 29, 1957", 300 I. C. C. 239, wherein the Interstate Commission allowed a 5% increase in coach fares but refused the full 45% increase asked on first class fares. It is highly doubtful if the increase of 5% for coach and 20% on first class fares will cover the passenger deficit even by excluding the dining car deficit.

13. The Appellant Interstate Commission says "that the determination of the amount of reasonable contribution toward indirect cost involves the exercise of an informed judgment based primarily upon value of service and not upon cost" (its brief in No. 28, page 23), but apparently feels that only the Interstate Commission has sufficient "informed judgment."

14. 325 U. S. 507, 518; 344 U. S. 254, 276.

The report and order in this case is different from *State of New York* v. *United States*, 98 F. Supp. 855, aff'd 342 U. S. 882, and *State of Illinois* v. *United States*, 101 F. Supp. 36, aff'd 342 U. S. 930. In the *New York* case the order of the Commission merely made effective for intrastate traffic within the State of New York the higher interstate commutation rates which had been found to be reasonable and had been established between stations in Connecticut and New York, pursuant to 269 I. C. C. 87, which increase the New York Commission had refused to grant. In sustaining the report of the Commission the court, in addition to approving the persons and localities preference finding, also stated at page 861:

> "We also have findings as to relationship of commutation traffic to the total operation. We have a finding of reasonableness of the interstate rates which implies a correct percentage allocation of commutation revenue and expense."

In the *Illinois* case, the Commission not only made a specific subsidiary finding on revenue discrimination to the effect that:

> "The fares approved herein will yield a return after taxes of about 3.2 per cent, and an average increase of about 20 per cent or $1,300,000 per *annum, which we find to be the approximate measure of the revenue discrimination* against interstate commerce resulting from petitioner's present multiple and commutation fares" (281 I. C. C. at 552) (Emphasis added).

but the Commission also stated that the Illinois Central's multiple fares were below those the Commission had recently approved in another proceeding and further found that the prescribed fares would remove a person-locality discrimination against interstate commerce which existed in connection with petitioner's present multiple and commutation fares (Finding 7, 281 I. C. C. at 553). In that case the Commission also found "that in connection with

its minimum and round-trip suburban fares, petitioner has not shown any person-locality or *revenue discrimination against interstate commerce*." (Finding 2, 281 I. C. C. at 552) (Emphasis added). In the instant case, the Interstate Commission has raised the minimum intrastate fare to 25¢ per trip and the suburban one-way fares are to be based on 3¢ per mile (297 I. C. C. at 361, R. 39) while at the same time finding that the Milwaukee's interstate fares in the Chicago area are 2.5¢ per mile and the minimum, 15¢ (297 I. C. C. at 354, R. 29). Hence, on the Commission's own statement, the actual interstate fares are below those which the Commission prescribes for intrastate.

As we have before pointed out, the report shows a deficit from passenger operations of $22,824,890 while the 'out-of-pocket' deficit attributable to the suburban service is $306,038. The report further shows that Milwaukee earned from its freight operations over $37,300,000 but does not show how much of that net income is attributable to Illinois intrastate freight or how much is due to purely interstate commerce. If the Illinois intrastate freight contributed only a small percentage of the total net income, such intrastate freight would more than offset the suburban passenger deficit to a greater proportion than the interstate freight gives to the interstate passenger service. The absence of any findings which would indicate that the intrastate revenues (freight and passenger) fail to contribute their fair share to the total revenues of the carrier—and there is no evidence in the record upon which to predicate any such findings—should clearly sustain the position of the appellees, *i.e.*, that there is no undue burden on interstate commerce caused by the intrastate suburban fares.

We, therefore, respectfully submit that in the absence of the requisite basic finding of "fair proportionate contribution" there was no basis for the imposition of the

Interstate Commission's authority to establish intrastate rates.[15]

II.

THE REPORTED FACTS AND SUBSIDIARY RECITALS, AS WELL AS THE EVIDENCE, DO NOT SUPPORT THE FINDINGS THAT THE RATES ARE JUST AND REASONABLE.

If the Interstate Commission properly exercises its jurisdiction to remove an undue and unjust discrimination against interstate commerce under Section 13(4), it must find that the rates it establishes are just and reasonable, *Mississippi Public Service Commission* v. *United States*, 124 F. Supp. 809, aff'd 349 U. S. 908. The statute confers no authority to raise intrastate rates above a reasonable level, *United States* v. *Louisiana*, 290 U. S. 70, 78. However, it must be kept in mind that we are proceeding under a Section 13(4) discrimination against interstate commerce and not under Section 15 to establish just and reasonable rates.

Here again, the Appellants argue that there was introduced all sorts of evidence on cost of service and deduce that such costs make the prescribed rate just and reasonable and therefore a justification for the Commission's order. In fact, the Interstate Commission goes so far as to say that under the law of Illinois lower fares could not be prescribed by the Illinois Commission—another way of attempted justification for the order.[16] Suffice it to say that what the Interstate Commerce Commission overlooks is that the Illinois Supreme Court passes on the Illinois Commission's orders and the Illinois Commission's deter-

15. In the absence of a basic finding to support the order it is not necessary to examine the evidence. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & Pac. R. Co.*, 294 U. S. 499, 505.

16. Interstate Commission's brief in No. 28, page 33.

mination of whether or not there is a loss with the establishment of a just and reasonable rate in connection therewith. It is one thing to make our own determination of losses and rates and another to have the Interstate Commerce Commission make the determination for us.[17] The suburban expenses on a fully distributed basis, as well as on an out-of-pocket cost, follow the System of Accounts which the Interstate Commission is now investigating and which allocates expenses between the various services. Besides, if the Milwaukee thought that the Illinois Commission's order denying an increase was erroneous on the evidence submitted, they could have appealed and taken advantage of the *Fleming* case (57 N. E. (2) 384, 388 Ill. 138).

As we have demonstrated under Point I (*Supra*), the justification for the exercise of Interstate Commerce Commission jurisdiction does not rest alone on cost of service but on unjust discrimination against interstate commerce. An unremunerative intrastate rate does not authorize Interstate Commission jurisdiction to raise that rate, *Florida* v. *United States*, 282 U. S. 194, nor does a mere disparity in rates, *North Carolina* v. *United States*, 325 U. S. 507, justify such jurisdiction.

17. Especially is this true at this time. The Interstate Commission has opened an investigation as to the Passenger Train Deficit and the "rules governing operation of operating expenses, etc., between freight and passenger service." 70th Annual Report of I. C. C., page 53. See also, Commissioner Mitchell's dissent in "Increased Fares, Official Territory, 1956", 300 I. C. C., 239 (April 29, 1957) where he states:

> "The alleged passenger deficit is arrived at by using an old formula of the Commission which many of us doubt gives an accurate picture of the passenger operation. This Commission, itself, is now engaged in an investigation covering that very formula. Unfortunately, it will be some time before the report will be issued, but I am hopeful, and believe, that the formula will be materially changed and, the enlarged and exaggerated passenger deficit now shown by using our present formula will be eliminated to a great extent."

Outside of costs, the report's only justification for the reasonableness of the prescribed rates is a comparison with the rates of the North Western Railroad. It is conceded by the Appellants that no evidence was offered showing similarity of equipment, service or operating conditions between the Milwaukee Railroad and the North Western. While rate comparison may have some probative value when used in the right situation, *Youngstown Sheet and Tube Co. v. United States*, 295 U. S. 476, 480, they do not establish the reasonableness of rates without a similarity of conditions and operations.

However, both Appellants argue that the District Court has mis-read the Commission's report[18] and argue that the North Western fares and those of other railroads were introduced for the purpose of proving that the suburban traffic could bear increased fares. This is not a case where the interstate rates are being raised to the level of a previously determined reasonable interstate rate.

Again, we are back to the fundamental issue—will mere cost of service with the showing that the traffic can bear increased rates justify the Interstate Commerce Commission to establish higher intrastate rates? If proportionate contribution in relation to interstate or total income is not necessary, then the reasonableness of the rate becomes the ability to pay and the value of service becomes what the traffic will bear, instead of an effort to remove a "real discrimination against, and obstruction to, interstate commerce".[19]

18. If the court mis-read the report, it was justified in so doing since we had called attention in our petition for reconsideration before the Commission that the report rested the reasonableness of the rates upon such comparison (See R. 72-73), and if the real purpose of the Commission was as the Interstate Commission's counsel now states, the Commission should have modified its report so that it stated what they now say was intended. We believe the report speaks for itself, rather than the meaning now supplied by counsel.

19. *Wisconsin Railroad Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 590.

III.

THE DECISION OF THE DISTRICT COURT THAT THE STATE COMMISSION SHOULD BE AFFORDED THE CHANCE TO FIX RATES ON THE SAME BASIS AS THE INTERSTATE COMMISSION IS FULLY JUSTIFIED BY THE FACTUAL SITUATION IN THIS CASE.

The opinion of the lower court that if "different evidence is to be offered or a different basis of fares is to be urged before the Interstate Commission, the state commission should have been given a chance to fix fares on the same evidence and same basis" (R. 469) must be read in context with the court's decision. The court had already decided that the report of the Commission lacked a finding as to what the intrastate fares should contribute as a fair proportionate share of the Railroad's total income and "without the latter finding the order of the Interstate Commission can not stand" (R. 465).

The importance of the submission to the state commission on the same basis and evidence becomes apparent when the facts of this case are studied and arguments of the Appellants analyzed. The record clearly shows that the rates sought to be increased are primarily intrastate (the two so-called interstate suburban points in Wisconsin are insignificant). The railroad came to the Illinois Commission and presented a case which the state commission did not feel justified an increase in rates. It was purely a deficit question on the intrastate suburban rates and the Illinois Commission determined on the record before it that the alleged deficit was non-existent, and this determination was not appealed by the Milwaukee Railroad. Instead, an entirely new forum was sought and a different case presented.[20]

20. Appellant Railroad states that the items not included before the State Commission were either non-existent (depreciation on locomotives of $150,000) or of a minor consequence ($103,000 on maintenance of way). The so-called non-existent depreciation could have been estimated (even steam locomotives have depreciation)

Not a different case from the standpoint of making a showing of discrimination against interstate commerce, but a different showing of expense and resulting revenue deficiency. Unless there is some requirement of submitting the same case to the state commission, a carrier could file a reduced intrastate rate with the state commission, which normally would be allowed without suspension or hearing, and then go to the Interstate Commission to have it set aside as constituting a discrimination against interstate commerce.

As we have hereinbefore pointed out, the Milwaukee Railroad and the Interstate Commission seek to reduce the proof and evidence in a Section 13(4) proceeding to that required in a Section 15 rate case—in place of revenue discrimination against interstate commerce mere revenue deficiency. If this is to be the construction of Section 13(4), then it is imperative that the state commission be given the same evidence and basis for establishing a just and reasonable rate. Otherwise, a state commission is not even a "way station in a journey to the Interstate Commission" but is reduced to a bulletin board for the posting of the Interstate Commission order.

And it is no answer to say, as the Milwaukee Railroad contends,[21] that because the state commission entered its appearance and members of its staff participated in the Interstate Commission proceeding, that the state commission is charged with having received the evidence therein produced and should enter an order thereon. The Railroad's position would not even let the state commission be a way station.

The doctrine announced by the District Court in no way curtails this court's decision in *Florida* v. *United States*, 282 U. S. 194, or the authority conferred by Section 13(4). The power of the Interstate Commission to remove undue

and if $103,000 is of minor significance, then there was no reason to include it in the Interstate Commission proceedings.

21. Its brief in No. 12, page 16.

discrimination,—"real discrimination"—against interstate commerce is not diminished if a factual showing is made to support a finding of a failure to contribute a fair proportionate share of the carrier's income. It is only when a case is presented on revenue *deficiency*, not discrimination, for the establishment of a just and reasonable intrastate rate—and without a prior proceeding having fixed a reasonable interstate rate to which level the intrastate rate is sought to be raised—that the requirement of a presentation to the state commission upon the same basis and evidence becomes necessary. In *State of North Carolina* v. *United States*, 128 F. Supp. 718, 724, aff'd 350 U. S. 805, the question was whether the jurisdiction of the Interstate Commission was prevented until "remedies under state law had been exhausted" and in *State of Illinois* v. *United States*, 101 F. Supp. 36, 47, aff'd 342 U. S. 930, it was whether the pendency of "a suit in the local courts in the State of Illinois to set aside a report and order of the Illinois Commerce Commission which refuses to permit the Illinois Central Railroad Company to make any changes or increases in its presently existently suburban fares" prevented the jurisdiction of the Interstate Commission under Section 13(4). Both opinions dealt with the exhaustion of the state remedy. Such is not the present situation and each case must rest upon its own particular facts and situation.[22]

22. Whether this court in *Florida* v. *United States*, 282 U. S. 194, 210, in using the language quoted by the Milwaukee Railroad (its brief pages 17-18) meant "exhaustion of state remedy" or used that language to emphasize the fundamental power of Congress to authorize the Interstate Commission to establish intrastate rates in removing discrimination we do not know. However, we do know this court also stated in that same opinion at page 212: "The Commission has no general authority to regulate intrastate rates" and again at page 214: "The authority to determine the *reasonableness per se of intrastate rates* lay with the state authorities and not with the Interstate Commerce Commission". *Florida* v. *United States* must be confined to the particular factual situation therein presented and is not contrary to the factual case decided by the District Court in the instant matter.

If the states are to retain any vestige of jurisdiction or authority over the determination of intrastate rates, this minimum right—the opportunity to make such determination upon the same evidence that the carrier presents to the Interstate Commission and as an independent body and not a mere rubber stamp—must be sustained.

Such a requirement does not become a condition precedent in the sense that the proceedings before the State and Federal Commissions must be in separate stages. Section 13(3) allows joint hearings and the usual procedure in suburban fare cases is to make application before both commissions and have a joint hearing with the same evidence being presented to the two commissions at the same time. A joint hearing was the procedure adopted in *State of Illinois* v. *United States*, 101 F. Supp. 36, aff'd 342 U. S. 930. It is the procedure which has been followed in other suburban fare cases and was recently followed in *In the Matter of Illinois Central Suburban Fares*, I. C. C. Docket 31955, 300 I. C. C. 53, (1957) and Ill. C. C. Docket 43175 and *Commutation Fares, Chicago, North Shore and Milwaukee Railway*, I. C. C. Docket 32043 (1957) and Ill. C. C. Docket 43625. The situation involved in the instant matter was ideal for a joint hearing since the railroad sought an adjustment in both intra and the two inter state suburban fares at the same time. Even the Interstate Commission in its report commented upon the departure from the usual procedure of filing petitions with both commissions, "so that like cooperative action could be taken." (297 I. C. C. at page 355, R. 30.)

IV.

THE ORDER OF THE COMMISSION CREATES A DISCRIMINATION AGAINST INTRASTATE COMMERCE INSTEAD OF REMOVING A DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Section 13(4) allows the removal of undue preference between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, and the removal of undue discrimination against interstate commerce. It does not authorize interstate preferences nor discrimination against intrastate commerce. The order of the Commission actually results in such a preference and discrimination.

We have heretofore shown that there is no revenue discrimination against interstate commerce. Proportionately the intrastate fares were contributing more than their fair share. In the absence of any other revenue figures, the only comparison which can be made is between the passenger deficits and the freight net earnings. The Interstate Commission's report showed that the Railroad suffered a deficit from passenger operations of approximately $23,000,000. The suburban operation did not contribute more than $1,200,000 to that deficit even on a fully distributed basis (R. 384) leaving an interstate passenger deficit of approximately $21,800,000. The report further shows that the Railroad earned from its freight operations over $37,000,000, but does not show how much of that income is attributable to Illinois intrastate freight. If the Illinois intrastate freight contributed only 5½% of the total, such intrastate freight would more than off-set the suburban passenger deficit to a greater proportion than the interstate freight provides for the interstate passenger service.

Also, as we have pointed out, the intrastate one-way and round-trip fares were already as high or higher than the corresponding interstate fares (R. 350), and the prescribed one-way fares on a 3¢ per mile basis with 25¢

minimum is considerably higher than the present interstate fares at 2½¢ per mile and 15¢ minimum (R. 29).

The fact that commutation fares for the longer hauls in the suburban territory results in a lower rate per mile than through passenger fares[23] actually works a further preference in favor of interstate and prejudice against intrastate commerce. Because of such lower cents per mile basis on the longer haul, the interstate commutation fares of Zenda and Walworth are on a lower per mile basis than the intrastate fares. Consequently, no matter how you compare the intra and inter state fares, either on a one-way and round-trip basis or on a commutation basis, the interstate rates are lower than the intrastate.

While a state should not enjoy the earnings from interstate commerce to support intrastate commerce, the state should only be called upon to furnish compensation "for the intrastate business reasonably proportionate to that for the interstate business". *Wisconsin Railway Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 589. In this case, there is even lacking the ordinary "disparity of rates".

Nor is a reversal of the District Court justified because an affirmance will require a refund to be made.[24] This Court should not be called upon to approve fare increases —whether intrastate or interstate—on the proposition that to disapprove will require refunds from rates which did not produce a profit for the paying of such refunds.

Nor is it an answer to say as the Milwaukee urges, that the suburban passenger will not be hurt by requiring him to pay the same fares as charged by other railroads. Rate making can not be put on such a simplified basis. Also, such a policy would apply to both sides of the street so that

23. A fact which the Appellant Railroad (its brief in No. 12, page 26) seems to think aids their showing of discrimination against interstate commerce.

24. Appellant Railroad states that such refund will come from other earnings (its brief in No. 12, page 27). This is not so, as the refund is only from the impounded increased suburban fares.

lower fares could equally be prescribed upon the same theory.

V.

THERE IS NO INDEPENDENT BASIS FOR ESTABLISHING THE TWO INTERSTATE FARES AND THE DISTRICT COURT ACTED PROPERLY IN SETTING THEM ASIDE.

It may be questioned whether the decree of the District Court actually enjoins and sets aside the two interstate rates of Zenda and Walworth.[25] However, upon the basis of the record and report of the Interstate Commission the fares prescribed for Zenda and Walworth have no independent basis for surviving the stricken intrastate fares. The only finding of justification for the reasonableness of the two interstate fares was upon "the same bases as herein prescribed for intrastate application" (Finding 5, R. 37). Obviously, if the basis for the establishment of the intrastate fares falls, so also the basis for the two incidental interstate fares.

CONCLUSION.

We therefore respectfully submit that the decree of the District Court entered on June 14, 1956 should be affirmed.

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25. See our Motion to Affirm in Nos. 502 and 503, October Term 1956, pages 8 and 9. Such issue will be raised directly if this court sustains the District Court and refunds are sought by Zenda and Walworth passengers.